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IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT C. HUNTZINGER, SPECIALIST,
United States Army, *Petitioner*,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

CAN A MILITARY OFFICER, WHILE UNDERTAKING A CRIMINAL INVESTIGATION, AUTHORIZE AND THEN CONDUCT A SEARCH?

IS THERE AN EXCEPTION TO THE FOURTH AMENDMENT FOR THE "REASONABLE ACTIONS OF A COMMANDER CHARGED WITH MAINTAINING GOOD ORDER AND DISCIPLINE"?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert C. Huntzinger, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 69 M.J. 1 (2010) (Appendix A). The opinion of the United States Army Court of Criminal Appeals is unpublished (Appendix B). The denial by the Army Court of the

petitioner's request for reconsideration of its opinion was also unpublished. (Appendix C).

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on April 30, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISION INVOLVED

This case implicates the Fourth Amendment to the United States Constitution in asking whether a military officer can both authorize and personally conduct a search:

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

This case involves Articles 92 and 134, UCMJ; 10 U.S.C. §§ 892 and 934. These sections are provided below:

10 U.S.C. § 892 (2005)

> Any person subject to this chapter who –
>
> (1) violates or fails to obey any lawful general order or regulation;
>
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order;
>
> (3) is derelict in the performance of his duties, shall be punished as a court-martial may direct.

10 U.S.C. § 934 (2005)

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty,

> shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315, Probable cause searches, provides in relevant part:

> (b)(1) Authorization to search. An "authorization to search" is an express permission, written or oral, issued by a competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.
>
> (d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:
>
> (1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of

command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of the war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(f)(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of

probable cause under this rule shall be based upon any of the following:

(A) Written statement communicated to the authorizing officer;

(B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

STATEMENT OF THE CASE

Procedural History

Contrary to his pleas, petitioner was convicted by a military judge[1] sitting as a general court-martial of violating a lawful general order by possessing sexually explicit materials on a laptop as well as on an external hard drive, and by possessing child pornography on the external hard drive while deployed to Iraq in violation of Articles 92 and 134, UCMJ; 10 U.S.C. §§ 892 and 934, respectively.

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[1] The military term for the trial judge, *see* 10 U.S.C. § 826 (2005).

Petitioner was also found not guilty of possessing child pornography at Fort Campbell, Kentucky.

The military judge sentenced petitioner to ten months confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

The Army Court of Criminal Appeals (Army Court) affirmed the conviction in an unpublished opinion (Appendix B) and denied the petitioner's request for reconsideration in an unpublished *per curiam* opinion (Appendix C).

The Court of Appeals for the Armed Forces (CAAF) granted review of petitioner's case on the following issues:

> WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT NO SOLDIER AT FORWARD OPERATING BASE (FOB) LOYALTY HAD A REASONABLE EXPECTATION OF PRIVACY IN ANY REGARD.
>
> WHETHER THE MILITARY JUDGE ERRED IN DENYING A MOTION TO SUPPRESS PETITIONER'S EXTERNAL HARD DRIVE AND PASSWORD PROTECTED LAPTOP WHEN THE COMMANDER WHO ORDERED THE SEIZURE OF THE

EQUIPMENT IMMEDIATELY SEARCHED THE EQUIPMENT UPON SEIZURE, DEMONSTRATING THAT HE WAS PERFORMING LAW ENFORCEMENT FUNCTIONS AND WAS NOT NEUTRAL AND DETACHED WHEN SEIZING THE ITEMS.

WHETHER THE DOCTRINE OF INEVITABLE DISCOVERY IS APPLICABLE WHEN THERE ARE NO INDEPENDENT POLICE ACTIVITIES, OR TESTIMONY OR EVIDENCE OF ROUTINE POLICE PRACTICES, THAT WOULD HAVE INEVITABLY RESULTED IN DISCOVERY, AND NO OTHER EXCEPTION TO THE FOURTH AMENDMENT APPLIES.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN CONCLUDING THAT PROBABLE CAUSE EXISTED TO SUPPORT THE SEARCH AUTHORIZATION OF PETITIONER'S LAPTOP COMPUTER AND DETACHABLE HARD DRIVE.

On April 30, 2010, CAAF affirmed the Army Court's decision in an opinion available at 69 M.J. 1 (2010) (Appendix A).

Statement of Facts

On January 19, 2006, while deployed to Iraq, Captain (CPT) Miller, petitioner's company commander, received a report from Sergeant First Class (SFC) Powell that SFC Powell had discovered what appeared to be child pornography in a group of computer files that SFC Powell claimed came from another soldier, Private (PV2) Parr. The video involved two naked young girls standing in a field. CPT Miller, who was leaving Forward Operating Base (FOB) Loyalty for a mission, directed his subordinates to conduct a preliminary investigation and report back to CPT Miller when he returned.

After initially denying knowledge, PV2 Parr eventually admitted that he had deleted the video, but insisted that he did not know where the video came from; he also denied knowledge of a second video that was hidden on his computer. Private Parr stated that he had shared files with three friends (in addition to SFC Powell) of which petitioner was one.

When CPT Miller returned, he reviewed PV2 Parr's statement, watched the two videos and then ordered First Sergeant (1SG) Goodwater to "seize the laptops and any external memory devices of Huntzinger [petitioner], Teran and Boudreaux." Captain Miller did not seek legal advice before ordering the seizure. He testified, "[I]t appeared that I had a contraband issue in the battery . . . so in keeping with maintaining good order and discipline in my unit I ordered this property seized."

At CPT Miller's direction, 1SG Goodwater went into petitioner's barracks room, seized petitioner's laptop computer and external hard drive, and brought them down to his own office where CPT Miller was waiting. First Sergeant Goodwater and SFC Powell also tried to seize Teran's and Boudreaux's computers, but their rooms were locked.

At the motions hearing as well as on the merits, CPT Miller testified that as soon as petitioner's computer equipment was brought to him he proceeded to plug the external hard drive into 1SG Goodwater's computer and search petitioner's external hard drive. At the motions hearing, CPT Miller testified, "I looked at the external hard drive--" and, "We plugged in his external hard drive into First Sergeant Goodwater's computer and viewed the contents and then he [petitioner] came down." Additionally, when asked by the trial counsel, ". . . correct me if I'm wrong but when the evidence was in the First Sergeant's office you looked at the external hard drives [sic]. . .," to which CPT Miller answered, "Yes." Finally, when asked by the Defense Counsel, "Once [petitioner's] laptop was brought to your office you said you viewed some of the files on the external hard drive?" Captain Miller again answered, "Yes." Captain Miller also tried to search petitioner's laptop but was unable to do so at the time because it was password protected.

CPT Miller was equally clear that he had searched petitioner's external hard drive while

testifying on the merits. He testified, "I took the hard drive and plugged it in to First Sergeant Goodwater's laptop which was in his office, obviously, and I—and opened it." He then described what he saw as he searched the hard drive, "I opened that file up and saw some still images and some movies that appeared to show child pornography." Captain Miller specifically denied that either SFC Powell or 1SG Goodwater searched petitioner's hard drive. He stated, "It was me," when asked, "One of the three of you opened files on that external hard drive. Is that correct?"

In his factual findings denying the defense motion to suppress, the military judge stated, "First Sergeant Goodwater took the [petitioner's] computer and hard drive back to his office where he plugged the [petitioner's] external hard drive into his own computer and began to look through the files there." When he issued his decision from the bench, the military judge stated, "The First Sergeant executed that search and found the evidence that the defense is complaining of."

Consistent with CPT Miller's testimony, 1SG Goodwater testified entirely contrary to the military judge's findings of fact: "Captain Miller, he plugged in the external hard drive and we saw some files."; "Captain Miller plugged in the external hard drive in my computer. He saw a series of files. I don't know what he saw . . ."; "I didn't see who was [sic] actually hooked it up. Probably it was the commander but I didn't."

The Army Court stated in its memorandum opinion, "We find nothing clearly erroneous in [the judge's] findings of fact and adopt them." The Army Court then determined that CPT Miller had probable cause to issue a search authorization. The Army Court entirely ignored the search conducted by CPT Miller. In response to petitioner's request for reconsideration, which again pointed out that the military judge's ruling was based upon a clearly erroneous fact (that 1SG Goodwater rather than CPT Miller had searched the computer equipment), the Army Court stated, "Our legal analysis relied only on the military judge's first seven findings of fact . . . ." The military judge's eighth finding of fact is the one stating that 1SG Goodwater, and not CPT Miller, conducted the search of petitioner's computer equipment. The Army Court did concede that CPT Miller had plugged the external hard drive into a computer but refused to consider whether the commander's actions constituted an illegal search or implicated the legality of the commander's order to seize the computer equipment in the first place.

After CPT Miller searched petitioner's external hard drive, the petitioner was brought into 1SG Goodwater's office and read his Article 31(b), UCMJ, rights. Captain Miller was seated behind the First Sergeant's desk, with the First Sergeant standing behind CPT Miller, and the company executive officer standing behind the petitioner. Petitioner's laptop was on the desk in plain view of the

petitioner, as was his external hard drive which was still connected to the desktop computer in that office.

The testimony demonstrated, and the military judge found as fact, that the accused requested legal counsel. Petitioner was then immediately questioned by CPT Miller, who asked petitioner for his password. Petitioner responded by asking if he could type in his password himself, but CPT Miller responded, "[N]o. Write it down." Petitioner complied. Captain Miller, in the presence of the petitioner, used the password and proceeded to view a document already opened and visible on the laptop screen.

Petitioner was ultimately charged and convicted based on the evidence contained in the laptop computer and external hard drive that CPT Miller ordered seized, brought to him, and which was then searched by him.

REASONS FOR GRANTING THE WRIT

The investigative tactics employed in this case are exemplary of the abuses of military authority possible under the current state of Fourth Amendment jurisprudence as applied within the armed forces. It is a case in which the initial error of an improper search was exacerbated when the officer who authorized the search then conducted the search, and the military courts used strained reasoning to uphold it. The legal issues presented within this writ address these systemic concerns.

CAAF held, contrary to *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), that a military commander could conduct law enforcement functions and simultaneously authorize a probable cause search or seizure. In short, CAAF held in this case that a military commander could serve as both law enforcement officer and magistrate in the same case at the same time - so long as there was no evidence of "bias."

Additionally, CAAF held that a military commander could search for evidence without any lawful authorization from any other authority, on the grounds that doing so constitutes the "reasonable actions of a commander charged with maintaining good order and discipline in his unit."

The Soldiers of a free country, sworn to defend the Constitution of the United States with their lives if necessary, deserve to have their own Fourth Amendment rights honored and respected, and for such reason this Honorable Court should grant petitioner's writ.

SUMMARY OF ARGUMENT

Several decades ago, the military's highest court struggled mightily to reconcile the dual functions of a military commander. On the one hand, military commanders routinely perform law enforcement duties as they are responsible for maintaining good

order and discipline in their units. Yet, on the other hand, military commanders have been authorized by rule to order probable cause searches and seizures. In a series of seminal cases several decades ago, the military's highest court, the Court of Military Appeals, held that the Constitution would not permit a military commander to perform both functions (law enforcement officer and magistrate) in the same case at the same time. *See, e.g., U.S. v. Ezell*, 6 M.J. 307 (CMA 1979). That Court even went so far as to state that the mere presence of the commander at the scene of the search or seizure would call into question the legality of the commander's authorization. *Id.* A commander who was personally involved in law enforcement duties was required to seek the approval, based upon probable cause, of either a higher level commander or a military magistrate in order to conduct a search or seizure.

In the present case, CAAF departed entirely from this precedent, and did so without even pausing to mention the Constitution of the United States. The facts here are plain and are not in dispute. The military commander ordered the petitioner's computer equipment brought to him, and when his subordinates complied the commander immediately proceeded to search petitioner's external hard drive. He also sought to search petitioner's laptop computer but found that it was password protected. After ordering petitioner to give him the password (even though petitioner had just formally requested legal counsel), the military commander used the password to search the laptop too.

It is impossible to reconcile the military commander's search in this case with the Fourth Amendment. Unfortunately, CAAF did not try to do so, but instead found that a commander acting as a "law enforcement official" with a "police attitude" is disqualified from authorizing a search only when "the evidence demonstrates that the commander exhibited bias or appeared to be predisposed to one outcome or another." 69 M.J. at 6.

The needs of the military do not necessitate an exception to Fourth Amendment requirements. Any military commander who wants to join the fray and investigate a matter can always do so; if that commander wants to conduct a search, all that commander has to do is request authorization from a neutral and detached official, whether that be the next higher commander, any other commanding officer in the chain of command, or a military magistrate or military judge. What has never been permitted prior to this case is for a military officer to simultaneously conduct law enforcement functions and also authorize probable cause searches or seizures; or, looked at differently, to authorize him or herself to conduct a probable cause search.

ARGUMENT

Military Rule of Evidence 315(d) (M.R.E.) permits impartial commanders to issue search authorizations. As the military's highest court stated in *U.S. v. Staff Sergeant Freeman*, "[T]he

requirement of impartiality . . . was intended to incorporate the neutral-and-detached standard of *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)."[2]

A commander who executes a search or otherwise engages in law enforcement activities in a particular case, ". . . thereby loses the objectivity and impartiality constitutionally required of an official who authorizes a search based on probable cause."[3] In the seminal case of *U.S. v. Ezell*, the Court of Military Appeals stated, "[A] commander is not neutral and detached if he becomes 'personally involved as an active participant in gathering evidence against accused.'"[4] In regards to the mere presence of the authorizing commander at the scene of the search, the Court in *Ezell* stated, "Presence would indicate to us that the commander has been engaged in law-enforcement activities *throughout his participation in the entire authorization process*,

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[2] 42 M.J. 239, 242 (1995).

[3] *U.S. v. Rivera*, 10 M.J. 55, 61 (C.M.A. 1980) (citing *U.S. v. Ezell*, 6 M.J. 307 (C.M.A. 1979)). The Court in *Rivera* also cites Supreme Court precedence, *Johnson v. U.S.*, 333 U.S. 1014 (1948). Many other military cases discuss the requirement for the commander to be neutral and detached in a quasi-judicial role and not executing law enforcement functions. *See, e.g., U.S. v. Lopez*, 35 M.J. 35 (C.M.A. 1992); *U.S. v. Freeman*, 42 M.J. 239 (C.A.A.F. 1995); *U.S. v. Murray*, 12 M.J. 139 (C.M.A. 1981); *U.S. v. Cordero*, 11 M.J. 210 (C.M.A. 1981).

[4] *Ezell*, 6 M.J. 307, 315 (1979) (citing *U.S. v. Guerette*, 49 C.M.R. 530, 532 (C.M.A.).

except in very extraordinary situations, which we will deal with on a case-by-case basis."[5]

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[5] *Ezell* at 319 (emphasis added). Interestingly, while the Drafters' Analysis to M.R.E. 315 in the 2005 edition and the current 2008 edition of the Manual cites the Supreme Court case of *Lo-Ji Sales v. N.Y.* for the proposition that "mere presence of an authorizing official at a search does not deprive the individual of an otherwise neutral character," the *Lo-Ji* case actually involves the suppression of evidence in part due to the presence of the magistrate at the search and his contemporaneous participation in overseeing the search. *See, Lo-Ji Sales*, 442 U.S. 319 (1979). In this case, CPT Miller was not only present at the search, he was the one who actually conducted the search of petitioner's computer equipment for evidence. As a matter of statutory construction, it should also be noted that this "mere presence" language in M.R.E. 315 is embedded within the section concerning military judges and magistrates, separate and distinct from the section governing authorizations by a commander. There is a very good policy reason to distinguish between a magistrate or judge, who are inherently judicial officials, and a commander, who routinely executes law enforcement functions as well as other duties.

Several military cases since *Ezell* have found exceptions to the "mere presence" rule but all of these cases start from the premise that presence is legally problematic. *See, e.g., U.S. v. Law*, 17 M.J. 229 (C.M.A. 1984) (holding that the commander's presence during the search was due to his interest in protecting the Soldier's personal effects); *U.S. v. Powell*, 8 M.J. 260 (C.M.A. 1980) (interpreting *Ezell's* "mere presence" rule as not constituting a *per se* disqualification); *accord U.S. v. Hall*, 50 M.J. 247 (C.A.A.F. 1999) (stating in dicta that the acting company commander's actions in "double-checking" on probable cause did not necessarily taint the subsequent search authorization by the actual commander). Again, in this case, CPT Miller was not only present, he actually conducted the search.

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion,[6] but an abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or the military judge's decision is influenced by a clearly erroneous view of the law.[7] Both are present here.

Simply put, there is no evidence in the record to support the military judge's finding that 1SG Goodwater "plugged the [petitioner's] external hard drive into his own computer and began to look through the files there."[8] Instead, all of the evidence in this case shows that CPT Miller was the one who searched petitioner's external hard drive as well as petitioner's laptop computer.[9]

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[6] *U.S. v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002) (citing *U.S. v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)).

[7] *U.S. v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) (citing *U.S. v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)).

[8] Appellate Exhibit X, paragraph 8.

[9] The military judge did include a finding that following 1SG Goodwater's search, "CPT Miller also viewed the files on the accused's external hard drive and opened a few of the files to view their contents." (Appellate Exhibit X, para. 8.) This finding alone mandates the legal analysis required by *U.S. v. Ezell* and its progeny concerning CPT Miller's lack of neutrality and detachment, as discussed, *infra*. Regardless, there is an important qualitative difference between the First Sergeant conducting a search which was assisted by CPT Miller and the clear facts on this case, which is that CPT Miller is the one who conducted the search of petitioner's computer equipment on his own.

Factually, there should be no dispute that CPT Miller searched the petitioner's external hard drive, as he admitted as much and 1SG Goodwater confirmed that testimony.[10] Additionally, his manipulation of the petitioner's password-protected laptop and subsequent entry of that password into the laptop and viewing of the displayed information constituted a search of that computer as well. That such actions constitute a "search" for purposes of the Fourth Amendment is well-settled law under not only *Arizona v. Hicks*, 480 U.S. 321 (1987), but also under military-specific case law. In *U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006), CAAF held that files on a computer should be treated as contents of a non-transparent container. Nothing on petitioner's laptop was in "plain view" until CPT Miller entered the petitioner's password.

Since CPT Miller had no authority to conduct any search of petitioner's computer equipment, the conclusion must be that his actions constitute an illegal search.

This is important because CPT Miller's illegal search necessitates a legal analysis that has not yet occurred in this case, not at the trial level, not by the Army Court, and not even by CAAF. The illegal search of petitioner's computer equipment, part of which search occurred in the petitioner's very presence, necessitates an analysis evaluating

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[10] *See* R. at 115-116, 118, 123, 276-277, and 282 (testimony of CPT Miller); R. at 87-88, 270 (testimony of 1SG Goodwater).

whether CPT Miller was ever neutral and detached and calls into question even the initial seizure of petitioner's computer equipment.

Whether looked at through the prism of case law or purely as a factual matter, the totality of CPT Miller's actions demonstrate that he never acted in the required quasi-judicial, neutral and detached manner. Instead, he acted like a law enforcement officer ferreting out evidence.

Most importantly, nowhere in the record does CPT Miller ever indicate that he even intended to authorize a probable cause search, much less that he understood any of the legal requirements for authorizing a probable cause search. In fact, CPT Miller expressly testified, "I can't give a legal definition of child pornography or pornography in general but I can tell you what-" only to be interrupted by the Trial Counsel, who stated, "There's [sic] Supreme Court justices that can [chuckling]." Again, it is black letter law that not only must an authorizing official be neutral and detached, the official must also be capable of determining the existence of probable cause.[11]

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[11] Even the military courts recognize this point of law. *See, U.S. v. Lopez*, 35 M.J. 35, 40 (C.M.A. 1992) (requiring "that the issuing official must be neutral and detached and must be capable of determining whether probable cause exists"); *See also, Ezell* at 312; *Rivera* at 40; *Khamsouk*, 57 M.J. 282. The inability of the authorizing official here to enunciate any pertinent legal standard is yet another basis undermining the military court's conclusion upholding the search and seizure in

Captain Miller could hardly be acting in a quasi-judicial manner when he was unable to provide any legal definition for not only child pornography but also "pornography in general." This is yet more evidence that CPT Miller was acting as a law enforcement officer and was not neutral and detached because any reasonable person acting in a quasi-judicial manner and intending to authorize a probable cause search would seek out some guidance prior to acting on a threshold issue on which they were ignorant. His decision to immediately request petitioner's password upon invocation of counsel also undermines any argument that CPT Miller was acting in the required quasi-judicial manner. In short, while the seizure of an item may be distinct from the search of that same item, in this case the search by CPT Miller demonstrates that the initial seizure was not authorized by a neutral and detached official upon probable cause. At a minimum, however, the illegal search mandates an entirely different legal analysis than accomplished by the trial judge, the Army Court, or the Court of Appeals for the Armed Forces.

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this case. While the official may not have to be "experienced in the intricacies of determining probable cause," as CAAF put it in *Freeman*, 42 M.J. at 243, the official has to have some legal standard upon which to find probable cause. *See generally Shadwick v. Tampa*, 407 U.S. 345 (1972) (holding that non-lawyer clerks possessed the requisite capacity to issue arrest warrants only for ordinary municipal ordinances).

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES ARMY COURT

OF CRIMINAL APPEALS

ARMY 20060976

UNITED STATES, Appellee

v.

Specialist ROBERT C. HUNTZINGER
United States Army, Appellant

Appeal to the Army Court of Criminal Appeals

Decided March 18, 2009

Before: Zolper, Cook and Baime, Judges

MEMORANDUM OPINION

BAIME, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of violating a lawful general order and one specification of possession of child pornography in violation of Articles 92 and 134, Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. §§ 892 and 934 (2005). The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to the grade of Private E1.

On appeal, appellant raises two assignments of error, one of which merits discussion, but no relief.[1] Specifically, we address appellant's allegation that "[t]he military judge erred when he denied the defense motion to suppress evidence obtained in violation of appellant's Fourth Amendment rights and Military Rules of Evidence 315 and 316." After considering both parties' briefs and superb oral arguments, we find the military judge did not abuse his discretion by concluding that the commander had probable cause to order the initial search and seizure of appellant's computer and hard drive. Thus, we affirm the findings and approved sentence.

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[1] The other assignment of error is whether "[t]he military judge abused his discretion when he denied the defense motion for assistance from an independent expert computer forensic analyst." After considering both parties' briefs and arguments, we find the military judge did not abuse his discretion by denying appellant's motion.

LAW

We review "[a] military judge's determination of whether probable cause existed to support a search authorization...for an abuse of discretion." *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005). "[W]e review the legal question of sufficiency for finding probable cause de novo using a totality of the circumstances test." *United States v. Leedy*, 65 M.J. 208, 212-13 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996) (holding that "[c]onclusions of law are reviewed *de novo*. . ."). "[T]his determination is based in large part on the facts found by the military judge, the review of which we conduct under a 'clearly erroneous' standard. Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." *Leedy*, 65 M.J. at 213 (internal citations omitted). We will "consider the evidence 'in the light most favorable to the' prevailing party." *Id.* (citing *Reister*, 44 M.J. at 413; *United States v. Flores*, 64 M.J. 451, 454 (2007)).

DISCUSSION

After hearing both parties' evidence and argument and considering their written motions, the military judge made extensive findings of fact. We find nothing clearly erroneous in his findings of fact and adopt them. A copy of his findings of fact and conclusions of law are attached as an appendix to this opinion. We next consider whether, under the totality of circumstances, his legal conclusions regarding the existence of probable cause are correct and conclude the military judge did not abuse his discretion.[2] Applying the principles of law outlined

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[2] We need not determine whether the commander asking appellant for the password to his locked computer violated appellant's rights. First, the commander asked for appellant's password after probable cause to seize the computer existed and

in Military Rule of Evidence 315(f), we agree with the military judge's determination that probable cause for the search authorization is supported by sufficient evidence. First, both Sergeant First Class (SFC) P and Specialist (SPC) P made oral statements indicating they saw alleged child pornography on their computers. Second, SPC P made a written statement indicating that alleged child pornography was on his computer and that he believed he received it from one of three soldiers with whom he exchanged files. Third, SPC P wrote in his statement that he thought "maybe [SPC] Huntzinger" downloaded the pornography to his computer. Fourth, SFC P told the commander he exchanged files with SPC P, which would explain how the alleged child pornography was ultimately brought to the command's attention. Fifth, Captain (CPT) M, the company commander, viewed the alleged child pornography on SPC P's computer.[3] Sixth, CPT M was "relatively confident" the alleged child pornography was on appellant's and/or two other soldiers' computers.[4] The military judge

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appellant's computer and hard drive were actually seized. Second, the government already properly had the computer in its possession and would have inevitably discovered any evidence on it. Third, the evidence that the commander found—an email describing a sexual act with a minor female—was not admitted into evidence. We also need not determine whether the military judge's conclusion that the commander properly asked appellant for his password is error. Assuming *arguendo* that the military judge's conclusion was incorrect, it has no bearing on both his and our determination as to whether probable cause to seize, and ultimately search, the computer existed already.

[3] We do not find appellant's argument that the commander was not neutral and detached to be persuasive. *See United States v. Freeman*, 42 M.J. 239, 242 (C.A.A.F. 1995); *United States v. Ezell*, 6 M.J. 307, 325 (C.M.A. 1979).

[4] In appellant's case, the company commander determined that the alleged child pornography was more than likely to exist on

correctly determined that CPT M had probable cause to seize and search appellant's computer and hard drive. Additionally, although we find probable cause existed to search and seize appellant's computer hard drive, we also find that the military judge was correct when he determined even if probable cause did not exist, the evidence would have been inevitably discovered. *See United States v. Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008). On 19 January 2006, appellant's name had been provided to the chain of command and identified as a suspected source for the child pornography. That same day, appellant's chain of command initiated an investigation and contacted U.S. Army Criminal Investigation Division, who interviewed appellant on the evening of 20 January 2006. Consequently, within approximately 48 hours of the command initiated investigation, appellant's computer would have been seized and inspected.

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one of the three soldiers' computers he ordered to be seized. Although appellant was only one of three possible sources of the contraband, and thus there may have been only a thirty-three percent chance that the contraband would be on appellant's computer, probable cause still existed. *See Bethea*, 61 M.J. at 187 (citing *United States v. Olson*, No. 03-CR-51-S, 2003 U.S. Dist. LEXIS 24607, at *16 (W.D.Wis. July 11, 2003) (stating that "probable cause does not require a showing that an event is more than 50% likely")).

CONCLUSION

We have determined that the findings and sentence are correct in law and fact and, on the basis of the entire record, should be approved. Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge ZOLPER and Judge COOK concur.

FOR THE COURT

/s/ MALCOM H. SQUIRES

APPENDIX B

UNITED STATES ARMY COURT
OF CRIMINAL APPEALS

ARMY 20060976

UNITED STATES, Appellee

v.

Specialist ROBERT C. HUNTZINGER
United States Army, Appellant

Summary Disposition on Reconsideration from Army Court of Criminal Appeals

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Decided April 24, 2009

Before: Sullivan, Cook and Baime, Judges

SUMMARY DISPOSITION ON RECONSIDERATION

Per Curiam:

We affirmed the findings of guilty and sentence in a memorandum opinion dated 18 March 2009. On 17 April 2009, appellant filed a Motion for Reconsideration *En Banc*.[1] Upon review of our memorandum opinion and appellant's motion for reconsideration, our decision remains unchanged. However, we take this opportunity to clarify an issue appellant raised in his motion.[2]

Appellant wrote we erroneously found "First Sergeant (1 SG) Goodwater ... plugged the accused's external hard drive into his own computer and began to look through the files there" when we adopted the military judge's findings of fact in their entirety. We agree Captain Miller plugged appellant's hard drive into ISG Goodwater's computer. However, our agreement does not change our original opinion, as our analysis of the legality of the seizure of appellant's computer and hard drive did not rely on who plugged in the computer. Our legal analysis relied only on the military judge's first seven findings of fact to conclude that the government properly possessed the computer and laptop; who plugged in the computer was not dispositive to our decision in this case.

Upon reconsideration, the findings of guilty and the sentence are affirmed.

FOR THE COURT

/s/ MALCOM H. SQUIRES

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[1] *En Banc* requests will only be granted in the rarest and most special circumstances. *See United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 68.5, 689, 4 L. Ed. 2d 1491, 80 S. Ct. 1336 (1960); *United States* v. *Pierce*, 40 M.J. 584 (A.C.M.R. *1994), rev 'd on other grounds*, 40 M.J. 601 (A.C.M.R. 1994).

[2] We decline to comment on appellant's second assignment of error. In footnote 1 of the original opinion, we explicitly found that the military judge did not abuse his discretion when he denied the defense request for appointment of an expert assistant.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

No. 08-0644

UNITED STATES, Appellee

v.

Robert C. HUNTZINGER, Specialist,
U.S. Army, Appellant

Appeal from the Army Court of Criminal Appeals

Argued January 29, 2010.
Decided April 30, 2010.

Before: Effron, C.J., delivered the opinion of the Court, in which Baker, Erdmann, Stucky, and Ryan, J.J. joined.

Chief Judge EFFRON delivered the opinion of the Court:

A general court-martial composed of a military judge sitting alone, convicted Appellant, contrary to his pleas, of two specifications of violating a lawful general order and one specification of possession of child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 934 (2000). The sentence adjudged by the court-martial and approved by the convening authority included a bad-conduct discharge, confinement for ten months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The United States Army Court of Criminal Appeals affirmed the findings and approved sentence. *United States v. Huntzinger*, No. ARMY 20060976, 2009 CCA LEXIS 209, at *7 (A.Ct.Crim.App. Mar. 18, 2009) (unpublished).

On Appellant's petition, we granted review of the following issues related to the evidence of child pornography obtained from the search of Appellant's laptop computer and external hard drive:

> I. WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT NO SOLDIER AT FORWARD OPERATING BASE (FOB) LOYALTY HAD A REASONABLE EXPECTATION OF PRIVACY IN ANY REGARD.
>
> II. WHETHER THE MILITARY JUDGE ERRED IN DENYING A MOTION TO

SUPPRESS APPELLANT'S EXTERNAL HARD DRIVE AND PASSWORD PROTECTED LAPTOP WHEN THE COMMANDER WHO ORDERED THE SEIZURE OF THE EQUIPMENT IMMEDIATELY SEARCHED THE EQUIPMENT UPON SEIZURE, DEMONSTRATING THAT HE WAS PERFORMING LAW ENFORCEMENT FUNCTIONS AND WAS NOT NEUTRAL AND DETACHED WHEN SEIZING THE ITEMS.

III. WHETHER THE DOCTRINE OF INEVITABLE DISCOVERY IS APPLICABLE WHEN THERE ARE NO INDEPENDENT POLICE ACTIVITIES, OR TESTIMONY OR EVIDENCE OF ROUTINE POLICE PRACTICES, THAT WOULD HAVE INEVITABLY RESULTED IN DISCOVERY, AND NO OTHER EXCEPTION TO THE FOURTH AMENDMENT APPLIES.

IV. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN CONCLUDING THAT PROBABLE CAUSE EXISTED TO SUPPORT THE SEARCH AUTHORIZATION OF APPELLANT'S LAPTOP COMPUTER AND DETACHABLE HARD DRIVE.

For the reasons set forth below, we conclude that the evidence was obtained from an authorized

search, and we affirm.

I. BACKGROUND

The present appeal concerns an investigation initiated by the commanding officer of Appellant's unit, Captain (CPT) Aaron J. Miller, during a deployment to Forward Operating Base (FOB) Loyalty, Baghdad, Iraq. CPT Miller ordered the investigation after obtaining information indicating the circulation of child pornography within his command. The ensuing investigation led to the discovery of hundreds of sexually explicit digital photos and video clips on Appellant's computer and external hard drive, including child pornography.

At the outset of the trial, Appellant moved to suppress the evidence from the search. The following summarizes the evidence presented at the hearing, as well as the findings of fact and conclusions of law entered by the military judge in denying the motion to suppress.

The commanding officer, CPT Miller, testified that he first learned of the child pornography issue as he was leaving the FOB on a mission. The unit's information officer, Sergeant First Class (SFC) Richard A. Powell, told CPT Miller that he had exchanged music files with Private First Class (PFC) Dennis Parr earlier in the day, and later discovered that one of the files contained a video clip depicting what he suspected was child pornography. CPT

Miller testified that SFC Powell appeared to be "shaken up" when he disclosed this information.

Based on this conversation, CPT Miller ordered the unit's first sergeant, Sergeant (1SG) Joseph Goodwater, to look into the situation. He instructed 1SG Goodwater to "make sure you get a statement from PFC Parr, make sure you get a statement from Powell and have those ready for me ... should we return to FOB Loyalty that evening." CPT Miller told 1SG Goodwater that they would "figure out what [they] need[ed] to do next" at that time.

1SG Goodwater testified that he first obtained a statement from PFC Parr. PFC Parr said that he had previously shared music files with three other soldiers, in addition to Appellant. According to PFC Parr, the video clip unexpectedly popped up on his computer earlier in the day. He immediately deleted the file, but did not report the incident to anyone. PFC Parr told 1SG Goodwater that he had shared files with SFC Powell and three other individuals, including Appellant. In response to the question as to who might have "downloaded pornography to your computer or hard drive," PFC Parr responded: "Maybe Huntzinger." PFC Parr also provided his computer to 1SG Goodwater.

CPT Miller testified he returned to FOB Loyalty in the evening, and 1SG Goodwater briefed him on the status of the investigation, including the information obtained from PFC Parr. CPT Miller reviewed PFC Parr's written statement. He also viewed two videos discovered on PFC Parr's computer. CPT Miller

testified that one of the videos was the same as the video viewed by SFC Powell, and he described the second, entitled "13-year-old Russian girl," as "pornography." He noted that PFC Parr had "specifically named Huntzinger as someone he could have received pornography from." He also testified that "at this point it appeared that I had a contraband issue in the battery and that these other three individuals may have the same material on their computers and external memory devices." CPT Miller directed 1SG Goodwater to search the barracks rooms of the three soldiers and to seize their laptop computers and external memory devices.

1SG Goodwater testified that Appellant's room was located in a brick building on FOB Loyalty, which he shared with two other soldiers. He added that the barracks rooms were subject to regular inspections and that items permitted on the FOB were highly regulated. When he went to Appellant's room, the door was open. He entered the room and seized Appellant's laptop computer and external hard drive.

CPT Miller viewed files on Appellant's external hard drive, including one entitled "nasty" and a large number of files depicting what he considered to be child pornography. At that time, he could not view files on Appellant's laptop computer because it was password protected.

Later that evening, CPT Miller advised Appellant of his self-incrimination rights under Article 31, UCMJ, 10 U.S.C. § 831 (2000). Appellant said that

he wanted to speak to an attorney. CPT Miller asked Appellant for the password to his computer, which he provided. CPT Miller used the password to search the files on Appellant's laptop computer, leading to the discovery of additional pornographic material.[1]

The following day, two agents of the United States Army Criminal Investigation Command (CID) conducted an investigation into the incident. Appellant signed a consent form, agreeing to the search of his laptop computer, external hard drive, and an SD memory card. Later analysis of these sources identified evidence admitted against Appellant at trial.

The military judge denied the motion to suppress, ruling that CPT Miller had probable cause to search and seize Appellant's computer and hard drive under M.R.E. 315 and the Fourth Amendment. He found that CPT Miller based his decision on reliable information regarding the discovery of child pornography on PFC Parr's computer, as well as information indicating that the pornography had been provided to PFC Parr by one of three identified soldiers, including Appellant. The military judge also

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[1] In the present appeal, Appellant focuses on CPT Miller's request for his password as a factor bearing on CPT Miller's impartiality in the context of a search authorization under the Fourth Amendment and Military Rule of Evidence (M.R.E.) 315. Appellant does not contend that CPT Miller's request for his password violated either his privilege against self-incrimination or his right to counsel.

cited four additional grounds for denying the motion even if CPT Miller did not have probable cause to order the search: (1) the evidence was admissible under the good faith exception set forth under M.R.E. 311(b)(3) because CPT Miller had a substantial basis for determining probable cause, and officials executing the search and seizure acted reasonably and in good faith; (2) the evidence was admissible pursuant to the inevitable discovery exception under M.R.E. 311(b)(2); (3) Appellant had no reasonable expectation of privacy in combat zone living quarters that were highly regulated and subject to regular inspections; and (4) Appellant voluntarily consented to the CID search of his computer. The Court of Criminal Appeals affirmed the military judge's ruling, but expressly declined to reach the consent issue.

II. DISCUSSION

We review a military judge's denial of a motion to suppress for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F.2007). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or based upon a misapprehension of the law. *Id.* at 213. In the present case, we consider whether the military judge abused his discretion when he ruled as a matter of law that there was a substantial basis for finding probable cause existed under M.R.E. 315(f)(2). *See id.* at 212 (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F.2007)). We review the legal question of sufficiency for finding probable cause de novo, using a totality of the circumstances test. *Id.*

A. EXPECTATION OF PRIVACY IN APPELLANT'S QUARTERS (ISSUE I)

At the outset, we note that the granted issues concern the unique powers of search and seizure granted to military commanders under the application of the Fourth Amendment to members of the armed forces. *See, e.g.,* M.R.E. 311-17. These rules apply in domestic and deployed locations. Although the application of the rules and the exceptions therein depend upon the context, there is no general exception for locations or living quarters in a combat zone. *See United States v. Poundstone*, 22 C.M.A. 277, 279, 46 C.M.R. 277, 279 (1973).

In the present case, Appellant lived in a room that could be locked to prevent entry. The Government did not demonstrate at trial or on appeal that the case involved special circumstances in which Appellant would have no expectation of privacy in such a room, nor did the Government rely at trial or on appeal on a commander's powers of inspection under M.R.E. 313. Under these circumstances, we consider the present case in light of the military judge's primary ruling regarding probable cause and we do not rely on the alternate ruling, raised in Issue I, in which the military judge held that Appellant had no reasonable expectation of privacy in his living quarters.

B. DISQUALIFICATION OF THE COMMANDER UNDER M.R.E. 315 (ISSUE II)

A military commander may authorize a search based upon probable cause with respect to persons or property under the control of the commander in accordance with M.R.E. 315(d)(1).[2] Appellant contends that the commander was disqualified from granting the search authorization in the present case based upon his involvement in the investigation.

M.R.E. 315(d) provides that a person authorizing a search under the rule must be "an impartial individual." The evaluation of impartiality includes consideration of whether a commander's actions call into question the commander's ability to review impartially the facts and circumstances of the case. *See United States v. Freeman*, 42 M.J. 239, 243 (C.A.A.F.1995); *United States v. Middleton*, 10 M.J. 123, 129 (C.M.A.1981); *United States v. Powell*, 8 M.J. 260, 261 (C.M.A.1980); *United States v. Sam*, 22 C.M.A. 124, 127, 46 C.M.R. 124, 127 (1973); *United States v. Drew*, 15 C.M.A. 449, 453, 35 C.M.R. 421, 425 (1965). To the extent that our case law has indicated that a commander acting as a "law enforcement official" with a "police attitude" may be disqualified from authorizing a search, *see, e.g., Freeman*, 42 M.J. at 243, the disqualification applies when the evidence demonstrates that the commander exhibited bias or appeared to be predisposed to one outcome or another. The participation of a commander in investigative activities in furtherance of command responsibilities, without more, does not require a per se

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[2] The constitutionality of M.R.E. 315(d)(1) (describing the search authorization powers of military commanders) is not at issue in the present appeal.

disqualification of a commander from authorizing a search under M.R.E. 315. *See, e.g., id.* In that regard, a commander's direction to take reasonable investigative steps to ascertain the facts prior to making an impartial probable cause decision does not disqualify the commander from issuing a search authorization under M.R.E. 315. *Compare United States v. Ezell,* 6 M.J. 307, 320-22 (C.M.A.1979) (commander disqualified because of bias related to prior disciplinary issues involving accused), *with United States v. Hall,* 50 M.J. 247, 251 (C.A.A.F.1999) (commander not disqualified because he showed no "foul motivation" or "vindictiveness").

Appellant asserts that CPT Miller's actions demonstrate that he was performing law enforcement functions and did not possess a neutral and detached demeanor. Appellant claims that CPT Miller's testimony during the motion hearing before the military judge suggested that he never intended to authorize a search under M.R.E. 315, and that he did not understand the legal requirements of such a search. "[T]here is no constitutional requirement that the person [issuing the search authorization] have some minimal legal or educational qualifications." *United States v. Lopez,* 35 M.J. 35, 40 (C.M.A.1992) (citing *Shadwick v. City of Tampa,* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972)). As we stated in *Lopez,* the requirement for impartiality serves to establish "an orderly process and prevent the magistrate from representing a law enforcement interest while at the same time authorizing searches and seizures." *Id.*

The record does not demonstrate that CPT Miller was biased or participated in the investigation to such an extent, or in such a manner, that he compromised his ability to act impartially. The critical inquiry involves whether the commander conducted an independent assessment of the facts before issuing search authority and remained impartial throughout the investigation process. *See Lopez,* 35 M.J. at 41. (noting that a commander will be disqualified if the authorization to search is motivated by revenge).

CPT Miller did not predetermine any issues or the outcome of the probable cause decision prior to hearing and viewing the evidence. When he learned that child pornography was potentially circulating among members of his unit after being approached by SFC Powell, CPT Miller took appropriate follow-up action by ordering 1SG Goodwater to investigate and report back to him. In doing so, CPT Miller acted impartially in authorizing the search, reflecting a desire to establish facts before ordering the seizure of Appellant's computer equipment. Significantly, CPT Miller did not authorize the search until after 1SG Goodwater had narrowed the potential suspects to three soldiers, including Appellant.

CPT Miller maintained a degree of "control" over the investigation by directing 1SG Goodwater to speak to SFC Powell and to PFC Parr, but such actions do not suggest bias or predisposition. CPT Miller's actions were consistent with his responsibility as a commander to obtain the facts necessary to determine whether a search

authorization should be issued. After the facts were developed, CPT Miller determined that he had probable cause to authorize the search and seizure of the computer. His subsequent actions, such as requesting the computer password from Appellant, reviewing the files on the computer, and evaluating the evidence, reflect the reasonable actions of a commander charged with maintaining good order and discipline within his unit. These actions do not demonstrate that his prior actions, in the course of considering whether to authorize the search, were undertaken on the basis of bias or predisposition. In that context, we do not treat his decision to review the evidence following the search and seizure as retroactively invalidating his prior actions. There was nothing so unusual about CPT Miller's evaluation of the evidence that warrants a conclusion that he approached his duties under M.R.E. 315 with an impermissible bias. Having made a decision to authorize the search, he was not disqualified from viewing the fruits of the search for the purposes of exercising his responsibilities over the unit as a commander.

C. PROBABLE CAUSE (ISSUE IV)

M.R.E. 315(f)(2) defines probable cause as "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Within these parameters, "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... [concluding]' that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76

L.Ed.2d 527 (1983) (alterations in original) (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)). We apply four key principles in reviewing probable cause determinations under M.R.E. 315: (1) we view the facts in the light most favorable to the prevailing party; (2) we give substantial deference to the probable cause determination made by a neutral and detached magistrate; (3) we resolve close cases in favor of the magistrate's decision; and (4) we view the facts in a commonsense manner. *See United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F.2009).

Probable cause to search in this case was based on information provided to CPT Miller by SFC Powell and PFC Parr. Each independently viewed a computer file seemingly portraying child pornography. The information identified a small number of specific individuals involved in the file sharing, including Appellant. CPT Miller chose not to rely on this information alone, and he personally viewed the videos described by SFC Powell and PFC Parr. In describing his decision to authorize a search, CPT Miller testified:

> Sergeant Powell shared files with Parr. They both had the same clip on both computers. Parr then name[d] three other individuals who he shared files with. So, it seemed logical to me that somewhere there might be more additional videos depicting, you know, pornographic acts because the guy had shared with Parr and they both had the same clip on their computers and

> Parr stated he shared files with three other individuals. So, I felt relatively confident that what I was looking for-the contraband items were probably on those three laptops ... as well.

Based upon these facts, the military judge appropriately concluded that CPT Miller had a substantial basis for making a probable cause determination to authorize the search. In view of our conclusion in this regard, it is not necessary to address the military judge's alternate rulings that relied on the doctrines of good faith or inevitable discovery (Issue III).

II. CONCLUSION

The decision of the United States Army Court of Criminal Appeals is affirmed.

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Supreme Court, U.S.
FILED
SEP 29 2010
OFFICE OF THE CLERK

No. 10-158

In the Supreme Court of the United States

ROBERT C. HUNTZINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the commander's authorization of the search and seizure of petitioner's computer and hard drive violated Military Rule of Evidence 315(d) and the Fourth Amendment.

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In the Supreme Court of the United States

No. 10-158

ROBERT C. HUNTZINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 10a-24a) is reported at 69 M.J. 1. The opinion of the Army Court of Criminal Appeals (Pet. App. 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2010. The petition for a writ of certiorari was filed on July 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a specialist in the United States Army, was convicted by a general court-martial of two specifications of violating a lawful general order and one specification of possession of child pornography, in violation

of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 934. The convening authority approved petitioner's adjudged sentence of a bad-conduct discharge, ten months of confinement, forfeiture of all pay and allowances, and reduction of grade to Private E1. The Army Court of Criminal Appeals (ACCA) affirmed. Pet. App. 1a-9a. The Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 10a-24a.

1. Military Rule of Evidence (M.R.E. or Rule) 315(a) provides for the admission of evidence obtained as a result of an authorized search based on probable cause. Rule 315(b)(1) defines an "authorization to search" as an "express permission, written or oral, issued by competent military authority to search a person or an area" for specified evidence. Rule 315(d) provides that an authorization to search may be granted by an "impartial individual," including "[a] commander * * * who has control over the place where the property or person to be searched is situated or found." M.R.E. 315(d)(1). The Rule states that "[a]n otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization." M.R.E. 315(d). "[N]or does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts." *Ibid.* Under the Rules, "[p]robable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." M.R.E. 315(f)(2).

2. a. Petitioner was deployed to Forward Operating Base Loyalty, Baghdad, Iraq. Petitioner's commander was Captain (CPT) Aaron J. Miller. On January 19, 2006, Sergeant First Class (SFC) Richard Powell was reviewing computer music files that he had received the night before from Private First Class (PFC) Dennis Parr when he observed a video file containing nude minor females. SFC Powell reported his discovery to CPT Miller, who ordered First Sergeant (1SG) Joseph Goodwater to speak to PFC Parr. Pet. App. 13a-14a; Gov't CAAF Br. 3-4.

1SG Goodwater interviewed and obtained a written statement from PFC Parr, who agreed to a search of his computer. 1SG Goodwater found the same video on PFC Parr's computer. PFC Parr said that the video was not his and explained that he had exchanged files with three soldiers, including petitioner. In response to the question of who might have "downloaded pornography to your computer or hard drive," PFC Parr responded: "Maybe [petitioner]." Pet. App. 14a; see Gov't CAAF Br. 5 ("When asked 'who do you most likely think you got the file from,' [PFC] Parr said, 'Specialist Huntzinger.'") (citing CAAF J.A. 64).

That evening, 1SG Goodwater reported his findings to CPT Miller, who read PFC Parr's statement and viewed two videos that had been discovered on PFC Parr's computer. Pet. App. 14a. CPT Miller determined that one of the videos was the same one viewed by SFC Powell and that the other one, entitled "13-year-old Russian girl," was "pornography." *Id.* at 15a. Suspecting at that point that there was a "contraband issue in the battery and that these other three individuals may have the same material on their computers and external memory devices," CPT Miller directed 1SG Goodwater to search

the barracks rooms of the three soldiers identified by PFC Parr and to seize their computer equipment. *Ibid.*

1SG Goodwater entered petitioner's barracks room (the door to which was unlocked) and seized petitioner's laptop computer and external hard drive. Pet. App 15a. After 1SG Goodwater brought those items back to his office, CPT Miller viewed the files on the hard drive, including one entitled "nasty" and several files that he believed were child pornography. *Ibid.*; Gov't CAAF Br. 5. CPT Miller could not view the files on the laptop because it was password-protected. Pet. App. 15a.

Later that evening, CPT Miller advised petitioner of his right against self-incrimination under UCMJ Article 31, 10 U.S.C. 831, and petitioner requested an attorney. Pet. App. 15a-16a. CPT Miller asked petitioner for the laptop password, which petitioner provided. *Id.* at 16a. CPT Miller searched the files on petitioner's laptop, leading to the discovery of additional pornographic material. The next day, two agents of the United States Army Criminal Investigation Command (CID) interviewed petitioner, who consented to a search of his computer, hard drive, and memory card. The agents discovered additional evidence that was used against petitioner at trial. *Ibid.*

b. Petitioner filed a pretrial motion under M.R.E. 315 and the Fourth Amendment to suppress the evidence derived from the search and seizure of his computer and hard drive. The military judge denied the motion, holding that CPT Miller had probable cause to search and seize the computer and hard drive based on the discovery of child pornography on other soldiers' computers and information identifying petitioner as one of three possible sources (and the most likely one). Pet. App. 16a. The military judge also provided four addi-

tional grounds for denying the motion even if probable cause were lacking: (1) the searches were conducted in good faith; (2) the evidence would have been inevitably discovered; (3) petitioner had no expectation of privacy in living quarters in a combat zone; and (4) petitioner voluntarily consented to the search by the CID agents. *Id.* at 17a.

The ACCA affirmed. Pet. App. 1a-6a. It held that probable cause existed to search and seize petitioner's computer and hard drive, and that, alternatively, petitioner's files would have been inevitably seized and inspected. *Id.* at 3a-5a. In a footnote, the ACCA rejected petitioner's claim that CPT Miller was not neutral and detached when he authorized the search of petitioner's computer files. *Id.* at 4a n.3. In denying petitioner's motion for reconsideration, the ACCA clarified that it "agree[d] Captain Miller plugged [petitioner's] hard drive into 1SG Goodwater's computer," but stated that its "analysis of the legality of the seizure of [petitioner's] computer and hard drive did not rely on who plugged in the computer." *Id.* at 8a.

c. The CAAF granted review and affirmed. Pet. App. 10a-24a. The CAAF rejected petitioner's argument that CPT Miller was disqualified from authorizing the searches based on his involvement in the investigation. *Id.* at 19a-22a. The CAAF explained that a commander issuing a search authorization must be impartial under M.R.E. 315(d), but that disqualification occurs only when "the evidence demonstrates that the commander exhibited bias or appeared to be predisposed to one outcome or another." Pet. App. 19a. The CAAF further explained that a commander's participation in investigative activities in furtherance of command responsibilities does not *per se* establish such bias. *Id.* at 19a-20a.

Thus, the court reasoned, a commander is not disqualified merely because he directs reasonable investigative steps to determine the facts before making a probable cause determination. *Id.* at 20a.[1]

Applying those principles, the CAAF determined that CPT Miller did not prejudge any issues or the outcome of the probable cause decision before examining the evidence. Pet. App. 20a-21a. It explained that CPT Miller did not authorize the search until 1SG Goodwater had narrowed the list of suspects to three soldiers, including petitioner. *Id.* at 21a. The court noted that although CPT Miller retained a degree of control over the investigation by ordering 1SG Goodwater to speak to PFC Parr, those actions—far from showing bias—were consistent with CPT Miller's command responsibilities to obtain the necessary facts before determining whether a search should be authorized. *Ibid.*

The CAAF further stated that CPT Miller's subsequent conduct of requesting petitioner's password, reviewing the files on the computer, and evaluating the evidence reflected a commander's reasonable concern with maintaining good order and discipline in his unit and did not show that CPT Miller was biased at the time he had authorized the initial search and seizure of petitioner's computer equipment. Pet. App. 21a-22a. The CAAF held that CPT Miller's post-authorization actions did not retroactively invalidate his proper pre-authorization actions. *Id.* at 22a.

The CAAF also concluded that probable cause supported the authorization to search in this case. Pet. App. 22a-24a. The CAAF did not rely on the military

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[1] The CAAF noted that the constitutionality of M.R.E. 315(d)(1) was not at issue in the appeal before it. Pet. App. 19a n.2.

judge's ruling that petitioner lacked an expectation of privacy in his quarters, *id.* at 18a, nor did it address the alternative grounds of good faith, inevitable discovery, or consent, *id.* at 24a.

ARGUMENT

Petitioner contends (Pet. 13-22) that the search and seizure of his laptop computer and external hard drive violated M.R.E. 315(d) and the Fourth Amendment, because the commander was not "impartial" or "neutral and detached" when he authorized the search and seizure. The CAAF's factbound decision upholding the validity of the search and seizure is correct, and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The Fourth Amendment's Warrant Clause requires that a search warrant based on probable cause be made by a neutral and detached magistrate instead of by the police who are engaged in investigating crime. See *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). The military has incorporated that principle in M.R.E. 315(d) by limiting the power to authorize searches based on probable cause to an "impartial" individual. Rule 315(d)(1)'s grant of authority to commanders to authorize a search is part of a long military tradition in which commanding officers have played a significant role in administering military justice. See *Weiss* v. *United States*, 510 U.S. 163, 174-175 (1994). Because commanders have a duty to maintain order and discipline, which includes investigation of criminal activities, the CAAF has held that a commander's participation in an investigation pursuant to command responsibilities does not automatically disqualify the commander from authoriz-

ing a search under Rule 315(d). Rather, it is "only when the commander participates as a law enforcement official or is personally and actively involved in the process of gathering evidence that he loses his right to authorize searches which can produce admissible court-martial evidence." *United States* v. *Freeman*, 42 M.J. 239, 243 (C.A.A.F.), cert. denied, 516 U.S. 1011 (1995); see Pet. App. 19a-20a; *United States* v. *Lopez*, 35 M.J. 35, 41-42 (C.M.A. 1992), cert. denied, 513 U.S. 1153 (1995); *United States* v. *Ezell*, 6 M.J. 307, 318-322 (C.M.A. 1979).

Petitioner relies on a statement by the Court of Military Appeals (precursor to the CAAF) in *Ezell* that the presence of the commander at the scene of the search or seizure would call into question the legality of the commander's authorization. Pet. 15, 17-18 (citing *Ezell*, 6 M.J. at 319). But Rule 315(d) expressly provides that "[a]n otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization." M.R.E. 315(d)(2). Indeed, the Analysis of the Military Rules of Evidence explains that this part of Rule 315(d) "clarifies the decision * * * in [*Ezell*] by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character." *Manual for Courts-Martial, United States* A22-28 (2008 ed.). In any event, to the extent any tension exists between the decision below and prior decisions of the CAAF or the Court of Military Appeals, it would be the CAAF's responsibility, not this Court's, to harmonize those decisions. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Turning to the facts of this case, the CAAF correctly held that CPT Miller acted impartially when he autho-

rized the searches in this case. As the CAAF explained (Pet. App. 21a-22a), when CPT Miller learned that soldiers in his unit in a combat zone in Iraq likely possessed child pornography on their computers, he reasonably directed his First Sergeant to look into the issue and to report back to him as part of his responsibility to maintain order and discipline in the unit and to obtain the necessary facts before authorizing a search. Far from taking an active role in the investigation or prejudging the case, CPT Miller waited until his First Sergeant had narrowed the suspects to three soldiers before authorizing the search and seizure. Further, CPT Miller's post-authorization actions of advising petitioner of his rights and of examining the files on his computer did not establish any pre-decisional bias on his part. As the CAAF held (*id.* at 22a), those actions were consistent with CPT Miller's responsibilities of maintaining order in his command; they did not show that his earlier acts were based on bias and predisposition.

In any event, whether an individual was biased or impartial is a question of fact, see *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995) (juror impartiality), and this Court ordinarily does not review factual disputes resolved by the factfinder and affirmed by two appellate courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Moreover, such findings of military courts, made in the context of a search in a military setting, warrant "great deference." *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976).

2. Contrary to petitioner's suggestion (Pet. 14, 18), the decision below does not conflict with this Court's decision in *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). In that case, the Court held that a magistrate was not neutral and detached for Fourth Amendment

purposes where, after issuing a search warrant for two obscene films and other undesignated items (to be named later) at an adult bookstore, he accompanied law enforcement agents to the store; conducted a "generalized search under authority of an invalid warrant" for additional obscene materials; ordered the seizure of additional materials; and directed the law enforcement agents to seize all "similar" items—improperly leaving that determination to the agents' discretion. *Id.* at 321-328.

Lo-Ji Sales is distinguishable from this case in at least two important ways. First, *Lo-Ji Sales* involved a civilian magistrate, not a military commander with multiple responsibilities (including the maintenance of good order and discipline in the field). Second, unlike the magistrate in *Lo-Ji Sales*, CPT Miller did not conduct an extensive, open-ended search under a patently invalid warrant, nor did he delegate to law enforcement or others the authority to determine what materials were contraband. Rather, CPT Miller ordered the seizure of petitioner's computer equipment after further investigation by his subordinates revealed petitioner's likely possession of contraband, and, once the computer was seized, he reasonably examined it for the presence of child pornography as part of his legitimate command responsibilities. Indeed, as the Analysis of the Military Rules of Evidence points out, Rule 315(d), which was written in conformance with *Lo-Ji Sales*, borrowed that decision's language. *Manual for Courts-Martial, United States* A22-28; see *Lo-Ji Sales*, 442 U.S. at 328 n.6 ("We do not suggest, of course, that a 'neutral and detached magistrate' loses his character as such merely because he leaves his regular office in order to make himself readily available to law enforcement officers who

may wish to seek the issuance of warrants by him.") (internal citation omitted).

The lack of a conflict with *Lo-Ji Sales* or any other decision of this Court, and the fact that petitioner does not allege a conflict with any decision of a federal court of appeals, reinforce the conclusion that this case does not warrant further review.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2010

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[2] Petitioner does not challenge the lower courts' determination that probable cause existed for the search at issue. Nor does petitioner address the alternative arguments accepted by the military judge or the ACCA—such as inevitable discovery and good faith, or the lack of an expectation of privacy in combat-zone living quarters (Pet. App. 5a, 17a)—that would compel the same result even if the commander's search authorization were deemed invalid.

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No. 10-158

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT C. HUNTZINGER, SPECIALIST,
United States Army, *Petitioner*,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Government asserts in its brief in opposition, "[O]nce the computer was seized, [CPT Miller] reasonably examined it for the presence of child pornography as part of his legitimate command responsibilities." (Opp'n at 10.) This statement is the heart of the matter at issue in this case. While the Government's assertion is an accurate reflection of the lower court's opinion, in petitioner's view it constitutes a dispositive concession, for there is no existing legal precedent supporting the notion that military commanders may conduct searches for criminal evidence without regard to the Fourth Amendment. On the contrary, such an assertion is in contravention to this Court's prior precedent as well as that of the Court of Appeals for the Armed Forces (CAAF). This case merits review because such a broad and expansive view of military authority violates the Constitutional rights of U.S. servicemembers serving their Nation in a time of war. Such an expansive view of military authority also calls into question the subordination of those military authorities to civilian control.

Put simply, it is impossible to reconcile Captain Miller's search of petitioner's computer equipment with the Fourth Amendment. No contraband had been discovered in regards to petitioner until CPT Miller personally searched petitioner's computer equipment. Until he searched the equipment, all CPT Miller had before him was a nondescript password-protected laptop computer and a

nondescript external hard drive. This case is akin to a situation in which a presumably neutral and detached magistrate orders the seizure of a purse suspected to contain contraband, but upon receipt of the purse the magistrate personally opens the purse and searches the purse's contents for contraband. Case law is plain: a search for computer files is an illegal search unless properly authorized pursuant to the Fourth Amendment, even within the military. *U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006) (Airmen living in barracks room had a reasonable expectation of privacy in digital files within their personal computers).

The Government seeks to avoid review by characterizing the lower court's opinion as fact bound, but that is incorrect. There are no facts in this case that would operate to limit the expansive assertion that a military commander may personally conduct a search for criminal evidence without any further authorization whatsoever, based solely on unspecified command responsibilities. The lower court did not state what those responsibilities were, how far they extend, or when they apply. Nor did the lower court pause to explain how any such responsibilities absolve the military commander from complying with the Fourth Amendment. In short, there are no facts present here to limit the reach or applicability of the lower court's opinion. This is particularly troubling since CAAF is the military's highest court. CAAF"s opinion also contains no limitation that would preclude legitimate command responsibilities from superseding other

Constitutional protections beyond search and seizure.

Once one recognizes CPT Miller's actions as an illegal search, the house of cards that is this military court-martial becomes apparent. The implications of the illegal search are plain and obvious: CPT Miller was performing law enforcement functions and never intended to perform duties as a neutral and detached magistrate. His personal search was entirely unlawful. In fact, there is no support in the record for the opposite conclusion. Captain Miller never testified that he intended to authorize a probable cause search, nor did he state that he even knew what the requirements were for a probable cause search. No other authority for a probable cause search is present in this case. The only way the military courts have thus far reached the conclusion in this case that CPT Miller was neutral and detached is by ignoring the illegal search and presuming neutrality. This is also the problem with the Government's attempt to distinguish *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). (Opp'n at 10.) Here, Captain Miller did not merely make himself available to law enforcement officers; he *was* the law enforcement officer. Likewise, Captain Miller was not merely present at the scene of a search; he personally conducted the search. It is hard to fathom how CPT Miller was not personally and actively involved in gathering evidence, when in fact he was the one who searched petitioner's computer equipment for contraband.

Captain Miller's conduct immediately following petitioner's invocation of rights and request for counsel further belies any notion that CPT Miller was ever neutral and detached; CPT Miller responded to petitioner's invocation of rights by ordering petitioner to provide the password to his laptop and then proceeded to search the laptop in front of petitioner.

In some areas, command authority might be quite broad, and it is undoubtedly true that some Constitutional requirements apply differently in the military context. But the claim made in this case is unprecedented and unwarranted. The soldiers, sailors, airmen, and marines of this free country are sworn to uphold and defend, with their very lives if necessary, the Constitution of these United States. There is no basis for a military officer to ignore and outright violate one of the most fundamental protections of our Constitution.

The Government concludes by stating that further review is not merited due to a lack of conflict with *Lo-Ji Sales* or any other decision of this Court. Petitioner disagrees. On the contrary, the lower court's opinion is in conflict with every single opinion of this Court in this subject area.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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